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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CARMEN POWELL, PLAINTIFF, v. CITY OF CHULA VISTA; CHULA VISTA POLICE DEPARTMENT; DET. RUTH HINZMAN; AGT. ANDERSON; AGT. OYOS; SGT. CERVANTES; AND PERSON ENTITIES UNKNOWN; COUNTY OF SAN DIEGO AND SAN DIEGO COUNTY PROTECTIVE SERVICES WORKERS JULIE SMITH, NADIA NAJORS, MEGAN PETFINGER, REBECCA SLADE AND PERSONS AND ENTITIES UNKNOWN; CHILDREN'S HOSPITAL; DIANA CHASE; NURSE DEBRA DAVIES, LCSW, Defendants.	**Case No.: 07 CV 1836 JAH (JMA)** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MORTEZA MIRKARIMI, M.D.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM** Date: March 3, 2008 Time: 2:30 p.m. Judge: Honorable John A. Houston Room: Courtroom 11

Defendant, MORTEZA MIRKARIMI, M.D. (hereinafter "DR. MIRKARIMI") respectfully submits this Memorandum of Points and Authorities in Support of his Motion to Dismiss PLAINTIFF's Complaint in its entirety, or causes of action therein, with prejudice.

I.

INTRODUCTION

CARMEN POWELL ("PLAINTIFF") filed the above-captioned complaint on September 19, 2007 against eleven individuals and various entities. DR. MIRKARIMI is not identified as a defendant in the caption. He is not referenced in the introductory factual portion of the Complaint where PLAINTIFF describes the alleged wrongful conduct of each defendant. It is not clear that PLAINTIFF intended for DR. MIRKARIMI to be a defendant. Notably, the Complaint does not contain a prayer for relief. DR. MIRKARIMI has not received sufficient information to put him on notice of any allegations against him and any relief sought from him. Wherefore, DR. MIRKARIMI asks this Court to dismiss the Complaint against him in its entirety, with prejudice.

PLAINTIFF contends she was unlawfully arrested in her home on August 17, 2006 by the Chula Vista Police Department ("CVPD") on false charges of Domestic Violence made by her husband. In connection with that arrest, her children were removed from her care and taken into custody by police and social workers. (Complaint, p.3). PLAINTIFF contends her rights were violated and that fraudulent evidence was used to substantiate her children being removed from her care. (Complaint, p. 5). She claims exculpatory evidence was not offered at the Child Protective Services ("CPS") hearing in which her custody was reviewed. (Complaint, p. 4). She also contends the police unlawfully arrested her and searched her home, and unlawfully seized her child.

The only potential "Count" PLAINTIFF may have tried to raise against DR. MIRKARIMI is for violation of 18 U.S.C. § 342, Conspiracy Against Rights. He is not mentioned elsewhere in the complaint. PLAINTIFF cannot assert a cause of action against DR. MIRKARIMI for violation of 18 U.S.C. § 342 because it is a criminal statute that does not provide a private cause of action to civil litigants.

II.

STATEMENT OF FACTS

The factual information provided in the Complaint is convoluted. However, Defendant believes the following is a reasonable interpretation of the information **alleged** by PLAINTIFF in the Complaint:

PLAINTIFF was married to Laverne Wilkerson who made allegations of abuse and domestic violence, allegedly after she requested a divorce. (Complaint, p. 3, ¶2). Apparently, Mr. Wilkerson reported to the Chula Vista police that PLAINTIFF had physically abused him and her children. (Complaint, p. 3, ¶2; p. 4, ¶3). These allegations were investigated by a number of individuals. Julie Smith, a social worker, allegedly substantiated child abuse based upon information that was elicited from PLAINTIFF'S minor child during a videotaped interview with another social worker, Deborah Davies at Rady Children's Hospital. PLAINTIFF claims the two women conspired to commit perjury and fabricate information in order to substantiate child abuse. (Complaint, p. 2, ¶1). It seems PLAINTIFF contends information submitted to the Court in the dependency proceeding was different from what transpired on the videotaped interview she herself watched. PLAINTIFF's position is that her child said nothing during the interview that would substantiate abuse; rather, the child indicated she was happy and safe at home.

Social worker, Nadia Najors, was also involved in investigating allegations of abuse. Allegedly, Ms. Najors presented false information to the Court, orally and in writing, during a dependency proceeding, misrepresenting the qualifications of an alleged child abuse expert, Diane Chase. Ms. Najors repeatedly advised the Court that Diane Chase was a physician; PLAINTIFF Diane Chase is a nurse. (Complaint, p. 2, ¶3). Ms. Najors failed to present exculpatory information to the Court – namely, that Ms. Najors was aware the Powell children had denied abuse in the home. Further, Najors had told Chula Vista police officers there were no grounds for removing Ms. Powell's children from the home. (Complaint, p. 2, ¶2; p. 3, ¶1). Ms. Najors committed perjury by telling the court that Ms. Powell's children had witnessed domestic abuse.

Defendant Megan Petfinger investigated the abuse allegations and ultimately caused PLAINTIFF to be listed in the Child Abuse Index. PLAINTIFF says Petfinger lied in court, fabricated documents and falsified evidence. (Complaint, p. 3, ¶2). A county detective, Ruth Heinzman, also allegedly fabricated evidence and failed to disclose exculpatory evidence, the content of which is not clear from the Complaint. PLAINTIFF contends that Heinzman provided some testimony to the Court concerning the medical condition of Powell's daughter's hands; PLAINTIFF takes issue with the veracity of this information. (Complaint, p. 4, ¶2).

Rebecca Slade, a social worker, allegedly lied about her communications with her daughter's treating physician and prevented PLAINTIFF's daughter from receiving appropriate care. (Complaint, p. 3, ¶3). Because her daughter did not receive medications, she had convulsions which were ultimately used to substantiate the claims of abuse against PLAINTIFF. Slade is also alleged, *inter alia,* to have committed perjury, "doctored" documents to change their content, and blocked the release of PLAINTIFF's children to appropriate adult family custodians. (Complaint, p. 3, ¶3).

Agent Anderson of the Chula Vista Police came to PLAINTIFF's home and arrested her for two counts of battery to a spouse and threats. Anderson made no reference whatsoever to any allegations of child abuse at that time. (Complaint, p. 4, ¶3). It seems Nadia Najors was present for this arrest. (Complaint, p. 4, ¶3). PLAINTIFF denies ever assaulting or threatening Mr. Wilkerson. The battery charges were dropped four days later. In conjunction with the arrest, PLAINTIFF says the Chula Vista Police searched her home without a warrant and unlawfully removed her children from her care. Child Welfare Services has not returned Ms. Powell's children to her.

PLAINTIFF now brings this lawsuit for violation of her constitutional and civil rights, alleging that social workers, police officers and investigators lied under oath and worked together to fabricate evidence and testimony to substantiate removal of the children from her care.

III.

ARGUMENT

A. LEGAL STANDARD FOR MOTION TO DISMISS

Federal Rule of Civil Procedure Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Dismissal is proper where PLAINTIFF "lack[s] . . . a cognizable legal theory" or fails to allege "sufficient facts [to support] . . . a cognizable legal theory." *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 699 (9th Cir. 1988). A dismissal for failure to state a claim is a ruling on a question of law. *Parks Sch. off Business v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995). A complaint will be dismissed for failure to state a claim if "it appears beyond doubt that the PLAINTIFF can prove no set of facts in support this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In deciding a Rule 12(b)(6) motion, the court generally looks only to the face of the complaint and documents attached thereto. *Van Buskirk v. Cable News Network, Inc.,* 284 F.3d 977, 980 (9th Cir. 2002). The Court must accept as true all material allegations in the complaint *NL Indus., Inc. v. Kaplan*, 792 F. 2d 896, 898 (9th Cir. 1986). It need not accept as true conclusory allegations or legal characterizations cast in the form of factual allegations. *W. Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir. 1981).

B. PLAINTIFF'S COMPLAINT IS UNINTELLIGIBLE

The Complaint names 15 defendants in the caption and alleges three different "counts." DR. MIRKARIMI is not identified in the caption as a defendant; it is not clear that PLAINTIFF intended him to be a defendant. The Complaint discusses specific named defendants and their alleged wrongful conduct. DR. MIRKARIMI is not referenced at all in the introductory portion of the complaint. The only reference to DR. MIRKARIMI is on page 5, paragraph 3 of the Complaint where PLAINTIFF purports to set out a cause of action for "Conspiracy Against Rights, Title 18 U.S.C. § 241." She claims that "'they' conspired to take my children and got other licensed government employees to lie and falsify documents." Presumably, she is referring to the named defendant social workers, investigators and police officers and alleging the cause of action against only those individuals and entities. However, she does say, "Diana Chase, Debra Davies, Dr. Harinder Grewal, Dr. Morteza Mirkarimi all played a significant roll (sic) in the mistreatment of my children and supported these defendants by providing them false documents and writings to submit to the Court." (Complaint, p.5, ¶4). PLAINTIFF does not identify the documents or writings to which she is referring or how they are false. No information is presented as to the chain of events concerning these alleged documents or the time frame at issue. The Complaint sets forth no facts sufficient to put DR. MIRKARIMI on notice of his alleged wrongdoing, and when it presumably occurred. On this basis alone, the Complaint should be dismissed, in its entirety, against DR. MIRKARIMI.

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Each "count" in the Complaint is based upon the general premise that various social workers, investigators, officers and agents of CPS and CVPD violated PLAINTIFF's civil rights. PLAINTIFF has not alleged any facts to suggest DR. MIRKARIMI violated her rights. PLAINTIFF cannot assert a private cause of action against him for Count 3, 18 U.S.C. §241, Conspiracy Against Rights, the only section of the Complaint where DR. MIRKARIMI is mentioned at all.

C. 18 U.S.C. § 241 DOES NOT PROVIDE A CIVIL REMEDY TO PLAINTIFF

As set forth above, the only reference to DR. MIRKARIMI in PLAINTIFF's Complaint is under Count 3. It is not clear PLAINTIFF intends to allege the count against him. Even if she does, the pleading does not state a claim upon which relief can be granted. 18 U.S.C. § 241 is a criminal statute that prohibits persons from conspiring together to violate and interfere with the civil rights of individuals. It states, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten or intimidate any person in any State, Territory, Commonwealth, Possession or District in the free exercise or enjoyment of any right of privilege secured to him by the constitution or laws of the United States or because of his having so exercised the same . . . They shall be fined under this title or imprisoned not more than ten years or both . . .".

18 U.S.C. § 241

The statute does not provide for a private cause of action for litigants like Ms. Powell. Where a civil litigant has attempted to allege a violation of 18 U.S.C. §421, courts have held that this criminal provision provides no basis for civil liability and affords no substantive protections. *See Aldabe v. Aldabe,* 616 F.2d 1089, 1092 (9th Cir. 1980). Any effort to amend would therefore be futile.

Further, even if PLAINTIFF was permitted to bring a civil action under this section, she would have to show she has been deprived of a constitutional right and that DR. MIRKARIMI "conspired" with others to so deprive her. No facts are alleged which demonstrate collusion or agreement between DR. MIRKARIMI and any government agency or individual to deprive PLAINTIFF of any rights, nor are any facts alleged that she was so deprived.

IV.

CONCLUSION

Based on the foregoing, PLAINTIFF's Complaint against DR. MIRKARIMI should be dismissed with prejudice.

Dated: January 24, 2008

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I, the undersigned, am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 1010 Second Avenue, Suite 2500, San Diego, California, 92101.

On January 24, 2008, I caused to be served the following document(s) described as follows:

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1. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MORTEZA MIRKARIMI, M.D.'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; and**

2. **NOTICE OF DEFENDANT MORTEZA MIRKARIMI, M.D.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT.**

on the parties in this action by placing a true copy in a sealed envelope addressed as follows:

Carmen Powell
372 Bay Leaf Drive
Chula Vista, CA 91910
Plaintiff in pro per

☒ **BY MAIL** - As follows: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at San Diego, California in the ordinary course of business. The envelope was sealed and placed for collection and mailing on this date following our ordinary practices. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC SERVICE** - As follows: To be filed electronically with the Clerk of the Court through ECF, and that ECF will send an e-mail notice of the electronic filing to the parties to this case at their respective e-mail addresses.

Executed on January 24, 2008, at San Diego, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Joanna Ryan Shippee